No. 71-725

In the Supreme Court of the United States

OCTOBER TERM, 1971

RICHARD A. SCHLOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Following a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted of having concealed an aircraft known to have been stolen, which was moving in interstate commerce, in violation of 18 U.S.C. 2313.[1] On March 31, 1971, petitioner was sentenced to three years' imprisonment, with eligibility for parole at any time

[1] The jury was unable to agree on a separate count under 18 U.S.C. 2312 charging the unlawful transportation of the aircraft.

under 18 U.S.C. 4208(a). The court of appeals affirmed without opinion (Pet. App. IA).

The sole issue raised here is whether the trial court erred in permitting the jury to separate after it had commenced deliberation. At the conclusion of the two-day trial, the court stated that it would let the jurors "set their own schedules" as to the length of that evening's deliberations (Tr. 372).[2] The jurors were admonished not to discuss the case or disclose any conclusions they might have reached concerning the verdict (Tr. 371-372). At 9:30 p.m., the jury requested a recess until the following morning. Petitioner's counsel objected to separation of the jury, alleging that a number of the jurors' spouses had been reportedly seen conversing with government witnesses; and that, if these jurors were released from the control of the bailiff, it would be prejudicial to petitioner (Tr. 380-381). The trial judge overruled the objection and permitted the jury to separate. The following morning, after further deliberations, the jury returned its verdict.

Petitioner contends that the trial court committed reversible error in permitting the jury to separate, particularly since they were not admonished immediately prior to the evening recess. However, during the course of the trial, the court had repeatedly warned the jury not to allow anyone to talk with them about the case and more specifically not to discuss the case with their families (Tr. 51, 166, 269,

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[2] "Tr." designates the one-volume trial transcript which we are filing herewith.

371-372). There is nothing to suggest that the jurors disregarded this admonition or that improper influences affected the jury's decision. Nor does petitioner suggest any specific instance of misconduct; he contends rather that the court's actions presented the opportunity for prejudice. There is no reason to conclude that the court abused its discretion in permitting separation absent any showing of actual prejudice. See *Tyler* v. *United States*, 397 F. 2d 565, 569 (C.A. 5), certiorari denied, 394 U.S. 917.[3]

All the courts of appeal which have been presented with the issue, other than the Seventh Circuit,[4] have held that whether a jury in a non-capital case should be sequestered rests within the sound discretion of the trial court. See, *e.g.*, *United States* v. *Acuff*, 410 F. 2d 463, 466-467 (C.A. 6), and cases there cited, certiorari denied, 396 U.S. 830. This Court has not previously deemed it necessary to reconcile the difference among the circuits on this matter; and there is nothing special in this case to require any different approach.

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[3] That the jurors were not prejudiced against petitioner by virtue of the separation is indicated by the fact that there was a disagreement on one of the counts.

[4] See *United States* v. *Panczko*, 353 F.2d 676 (C.A. 7), certiorari denied, 383 U.S. 935, and *United States* v. *D'Antonio*, 342 F.2d 667 (C.A. 7) (holding that this practice automatically requires reversal).

It is therefore respectfully submitted, that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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